***United States Court of Appeals***

***for the Second Circuit***


# AMICUS BRIEF

ORIGINAL

# 76-7247

B
P/S

## United States Court of Appeals

FOR THE SECOND CIRCUIT

RUTH ANN REED, as Administratrix of the Estate of DAN WILLIAM REED, deceased, and as parent, natural guardian, and best friend of CYNTHIA ANN REED, DEBORA LYNN REED and JULIE MARIE REED, all infants, *et al.*,

*Plaintiffs-Appellees,*

v.

FORWOOD CLOUD WISER, JR., and RICHARD E. NEUMAN,

*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

# BRIEF OF SOTIRIOS KARRAS, AS *AMICUS CURIAE*

SPEISER & KRAUSE, P.C.
*Attorneys for Amicus Curiae Sotirios Karras, et al.*
200 Park Avenue
New York, New York 10017

CHARLES F. KRAUSE
JOSEPH PIERINI
*Of Counsel*

## TABLE OF CONTENTS

# United States Court of Appeals

FOR THE SECOND CIRCUIT

---

RUTH ANN REED, as Administratrix of the Estate of DAN WILLIAM REED, deceased, and as parent, natural guardian, and best friend of CYNTHIA ANN REED, DEBORA LYNN REED and JULIE MARIE REED, all infants, *et al.*,

*Plaintiffs-Appellees,*

v.

FORWOOD CLOUD WISER, JR., and
RICHARD E. NEUMAN,

*Defendants-Appellants.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

## BRIEF OF SOTIRIOS KARRAS, AS *AMICUS CURIAE*

---

### Statement of the Issue

Does the Warsaw Convention limit or exclude liability of employees of an international air carrier?

## Nature of the interest of *Amicus* Sotirios Karras

Plaintiff Sotirios Louis Karras has been granted leave to file an *amicus curiae* brief.

The wife of Mr. Karras was killed in the crash of the Trans World Airlines jet which is the subject of this litigation. He now has pending an action for damages in the United States District Court for the Southern District of New York, captioned *Sotirios Louis Karras a/k/a Steve Karras* v. *Trans World Airlines, Inc. et al.*, 76 Civ. 90. Mr. Karras, along with other plaintiffs, has named as defendants, corporate officers of Trans World Airlines, Inc. as have the plaintiffs in the *Reed* action. Subsequent to the decision of Judge Frankel which led to this appeal, plaintiff Karras moved to strike the affirmative defenses based upon the Warsaw Convention ("Convention for the Unification of Certain Rules Relating to International Transportation by Air", 49 Stat. 3000 *et seq.*) as relating to those named corporate officers. This motion was granted but not certified for interlocutory appeal (a copy of Judge Frankel's decision was annexed to the motion seeking leave to file this *amicus* brief) because in the words of Judge Frankel, the "eventual handling of this case will be the same as is authoritatively determined by *Reed et al.* v. *Wiser et al.*"

Mr. Karras set forth in his motion the reasons for permitting the filing of an *amicus* brief.

*Amicus* Karras supports the position of the plaintiffs-appellees herein and respectfully urges this Honorable Court to affirm the decision of the court below.

## *ARGUMENT*

## POINT I

**The decision below does not impair the unity sought by the Warsaw Convention and is harmonious with precedent and with the policy of the Convention.**

It is undisputed (Appellants' brief, page 9) and clear from the official title of the Warsaw Convention ("Convention for the Unification of Certain Rules Relating to International Transportation by Air") that uniformity was one of the paramount goals of the Convention. It is equally clear that this ambition was a limited one. The limited nature of the ambition is obvious not only from the official title (". . . Certain Rules . . .") but also from a reading of the Convention itself.

The drafters expressly excluded from the Convention matters of contributory negligence (Article 21: ". . . in accordance with the provisions of its own law . . ."); determination of who can sue under Article 17 (Article 24: ". . . without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights."); determination of fault equivalent to *dol* (Article 25: ". . . in accordance with the law of the court to which the case is submitted . . ."); procedure (Article 28: ". . . questions of procedure shall be governed by the law of the court to which the case is submitted."); and calculation of the period of limitation (Article 29: ". . . determined by the law of the court to which the case is submitted.").

There are instances where the Convention is simply silent on particular issues: liability of air carriers for damage caused to third parties on the ground; establishment of an aeronautical registration system; mortgages

and aircraft liens; legal status of the commanding officer or pilot in command; the problems of rescue at sea. Ide, The History and Accomplishments of the International Technical Committee of Aerial Legal Experts, 3 J. Air. L. and Com. 27, 38-39 (1932), as cited in *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323, 340 (5th Cir. 1967), cert. den. 392 U.S. 905.

There are in the Convention certain provisions which are ambiguous and so open to varying interpretation. Sometimes the ambiguity arises from the choice of words. One example is found in Article 25, ". . . provisions of this convention which exclude or limit his liability . . ." See *Molitch* v. *Irish International Airlines,* 436 F.2d 42 (2nd Cir. 1970). Another example of such verbal ambiguity—and one which was perhaps intended so as to provide for flexibility—is found in Article 17, ". . . in the course of any of the operations of embarking or disembarking . . .". See *Day* v. *Trans World Airlines, Inc.,* 528 F.2d 31 (2nd Cir. 1975). Ambiguity has arisen also from the difficult nature of an issue; for example, what constitutes proper delivery and what constitutes adequate notice. See respectively *Mertens* v. *Flying Tiger Line, Inc.,* 341 F.2d 851 (2nd Cir. 1965), cert. den. 382 U.S. 816 (1965); *Lisi* v. *Alitalia,* 370 F.2d 508 (2nd Cir. 1966), affirmed by an equally divided court, 390 U.S. 455. Cf. *Canale* v. *Air France,* (1972) 34 R.G.A.E. 186 (T.G.I. Ajaccio, 1971), which rejected the United States' courts' notion of "adequate notice".

The argument that the Warsaw Convention, together with the case law of its member nations, forms a harmonious coherent whole governing international aviation relations or the argument that foreign nations would be appalled at the decision of the court below because it sounds a discordant note in what is otherwise a model of uniform interpretation (Appellants' brief, page 7) is sim-

ply wrong. As detailed above, room for individual interpretation remains, in some cases because of the express intent of the Convention, in other cases because the Convention is silent, and in other cases because of ambiguity present in the Convention.

However, insofar as "[t]he Court has an obligation to keep the interpretation as uniform as possible", *Block* v. *Compagnie Nationale Air France, supra,* 386 F.2d at 338, the decision of the court below fosters such uniformity and is consistant with the case law both of the United States and of other countries.

There are two cases directly in point, one American and one Canadian. In *Pierre* v. *Eastern Airlines Inc. and Cecil Foxworth,* 152 F.Supp. 486 (D.N.J. 1957) the defendant employee pilot, Foxworth, asserted the damage limitation of the Warsaw Convention as a defense. Plaintiff moved to strike the defense and the court decided:

> "The Warsaw Convention at the time of the accident (1953) applied to the carrier only. Various efforts had been made to amend the terms of the Convention to include the servants and agents of the carrier in the provisions of limitation of liability, but to no avail. Not until 1955 was the limitation so extended in Article 25 A of the Convention. Therefore the general practice and rules prevalent in the trial of negligence cases unaffected by the terms of the Warsaw Convention, will control the trial of the plaintiff against the defendant Foxworth."
>
> 152 F. Supp. at 489

It is misleading to attempt to impugn the authority of *Pierre* on the grounds that it was not appealed and that it was settled (Appellants' brief, page 13); litigation tac-

ties dictate such decisions. Also, the amount which Appellants call "nominal" was more than the then applicable Warsaw limitation. The basic fact remains that *Pierre* is the only American precedent directly in point.

In the Canadian case of *Stratton* v. *Trans Canada Air Lines*, 27 D.L.R.2d 670 (B.C. Sup.Ct. 1961), affirmed on other grounds, 32 D.L.R. 736 (B.C. Ct. of App. 1962), the court had to decide whether the Carriage by Air Act, the Canadian legislative embodiment of the Warsaw Convention, applied; and if so, whether the limitation provision would protect the defendant estates of employee pilots. The court first held that the Act did not apply since the carriage was not "international", and then, not knowing if the first holding would be upheld upon appeal, considered an alternate ground for holding the defendant estates liable without limitation:

> "It was submitted that the pilots were covered by the Act. The Act extends to carriers only. There is nothing in the Act that even remotely suggests that the word 'carrier' is to be interpreted as including employees of carriers. *Vide Krawill Shipping Co. Ltd.*, v. *Heard* (1959) 1 Lloyds L.R. 305; *The Pierre Case* (1957) [5 Avi 17,515] U.S. and Canadian Aviation Reports, 431."
>
> 27 D.L.R.2d at 674

The Court of Appeals' affirmation of the lower court's first holding concerning international carriage rendered the second holding technically dicta (Appellants' brief, page 14) but does not detract from the fact that the lower court had directly confronted and decided the issue of the liability of a carrier's employee under the Warsaw Convention. To call this case a "non-Warsaw case" (Appellants' brief, page 14) is to make a distinction without a difference since the Carriage by Air Act

*is* the Warsaw Convention legislated into Canadian law. The *Stratton* case remains the only Canadian case directly in point and, together with *Pierre, supra,* is one of the only two such cases.

Two other American cases are quite relevant since they hold that provisions of the Convention, though other than the limitation of liability provisions, cannot benefit corporate agents of the carrier. In *Scarf* v. *Trans World Airlines, Inc.,* 4 Avi (CCH) 17,828 (S.D.N.Y. 1955), Allied Aviation, a corporate agent of the carrier, moved for dismissal for want of proper venue under the terms of the Warsaw Convention. The court denied the motion even though it had earlier granted the same motion when made by the carrier. In *Hoffman* v. *British Overseas Airways Corp.,* 9 Avi (CCH) 17,180 (NY Sup. Ct. 1964), plaintiff admitted that the transportation was governed by the Warsaw Convention, that under the venue provision of the Convention New York was not a proper forum, and that thus a suit against BOAC could not be maintained in New York. However, the court permitted plaintiff to bring suit in New York against Allied Aviation, a corporate agent of the carrier.

In assessing these two cases it should be noted that the Convention draws no distinction between agents and employees. The official text of the Convention is the French text. *Block* v. *Compagnie Nationale Air France, supra,* 386 F.2d at 330. In Articles 16, 20(1), 20(2), and 25(2), the French word which is usually translated "agents" in the United States is "préposés." In French law one is "préposé" when one performs one's duties for the benefit of, and on behalf of, another, and is subject to the other's direction and control. See Carbonnier, *Droit Civil,* Vol. 4, page 362. That concept embraces servants and employees as well as agents. Section 54 of the 1949 Civil Aviation Act in the United Kingdom contains that interpretation:

> "For the avoidance of doubt in the construction of the Carriage by Air Act, 1932, whether as forming part of the law of the United Kingdom or as extended to any other country or territory, it is hereby declared that references to agents in the First Schedule to that Act include references to servants."

See also Section 4 of the Carriage by Air (Supplementary Provisions) Act, 1962 of the United Kingdom. The official English texts of the Hague and Guatemala City Protocols translate the word "préposés" as "servants and agents". Finally, Article 25(2)'s use of the phrase "agent of the carrier" is modified by the phrase "acting within the scope of his employment", thereby supporting the broader translation and meaning of "préposés". Thus the precedential value of *Scarf* and *Hoffman* extends to employees and is not limited to agents. Also, any intimation by counsel for Appellants (Appellants' brief, note page 8) to the effect that a carrier's employee may be protected by the Warsaw Convention where a carrier's non-employee agent is not is unfounded.

Two cases cited by counsel for Appellants (Appellants' brief, page 14) have no pertinence whatsoever. The quotation taken from the jury instruction in *Froman* v. *Pan American Airways, Inc.*, 1953 U.S. Aviation Reports 1 (Sup. Ct. NY Cty. 1953), when judged in context, simply stands for the proposition that an employer can be held vicariously liable for the willful misconduct of an employee. No employee was sued in the *Froman* case. The court was telling the jury that the defendant carrier could be held for unlimited damages if willful misconduct of the defendant, its officers or employees, was found. The full quotation is as follows:

> "Above that point the situation is made just the reverse, and the law provides that if he wishes to

> recover above the limit that is fixed above the statute he must establish that the accident came about as a result of the willful misconduct of the defendant, and included in the definition of the defendant is that of any officer or employee of the defendant."
>
> 1953 U. S. Aviation Reports at 5.

The case of *Schloss* v. *Matteucci*, 260 F.2d 16 (10th Cir. 1958) is inapposite because it dealt with a New Mexico statute in no way related to the Warsaw Convention, except that both provided for some form of limited liability. Every statute must be judged according to its own language and legislative history. Interpretation of one statute cannot be a guide to interpretation of another simply because both employ the notion of limited liability.

There are two contrary opinions. In *Wanderer* v. *Sabena et al.*, 1949 U.S. Aviation Reports 25 (NY Sup. Ct. 1949), the court gave the issue only perfunctory attention, expressing its view in a brief two sentences. In *Chutter* v. *KLM, et al.*, 132 F. Supp. 611 (S.D.N.Y. 1955) the court applied the Warsaw Convention's two year period of limitations and dismissed the action both against the carrier and the carrier's corporate agent. The court stated:

> "Whether Allied, the aviation service company in charge of moving the ramp, can claim the benefit of the time limitation in the Warsaw Convention is not entirely clear, but, a close analogy is found in cases involving the Carriage of Goods by Sea Act . . ."
>
> 132 F. Supp. at 613

The court then relied upon two decisions which had interpreted the Carriage of Goods by Sea Act: *United States* v. *The South Star*, 210 F.2d 44 (2nd Cir. 1954) and *Collins & Co.* v. *Panama R. Co.*, 197 F.2d 893 (5th Cir. 1952).

> "The basis for these decisions is that the stevedore is engaged by the carrier to perform a part of the contract of carriage, and it is impractical to distinguish the carrier from the community of persons whose joint activity is the carrier's activity."
>
> 132 F. Supp. at 613

The *Collins* case was specifically overruled in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959). The theory which the court in *Chutter* found to be the basis for the *South Star* and *Collins* decisions is also the theory advocated by counsel for Appellants (Appellants' brief, pages 19-21). The Supreme Court in *Herd* v. *Krawill, supra,* was not persuaded by this reasoning:

> "The holding of the majority in Collins that the liability of a negligent agent of a carrier, though not limited by any statute or contract, is nevertheless limited by and to the extent of the limitation granted by the shipper to the carrier in the bill of lading, simply because the agent is performing some part of the work thereby undertaken by the carrier, is clearly contrary to the above-cited decisions of this Court."
>
> 395 U.S. at 825

Judge Frankel in the decision below found the *Herd* case "a highly pursuasive analogy". At the time of the decision in the *Chutter* case the issue had not as yet been finally determined by the Supreme Court in *Herd*. If *Chutter* had been decided after *Herd*, instead of before, it most certainly would have been decided the other way.

It is instructive to note that courts of other countries have arrived at the same conclusion as our own Supreme

Court did in *Herd*. The Australian case of *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*, 95 CLR 43 (High Court 1955) was cited with approval in *Herd, supra*, 359 U.S. at 827. England agrees that exemption clauses cannot benefit anyone not a party to a contract of carriage, *Scruttons* v. *Midland Silicones Ltd.*, (1962) A.C. 446 (H.L. 1961), as does Canada, *Canadian General Electric Company Ltd.* v. *"Lake Bosomtwe" and Pickford & Black Ltd.*, (1970) 2 Lloyd's Rep. 81 (Sup. Ct. 1970). The logical inference to be drawn from these cases is that protection contained in the terms of the Warsaw Convention would be denied by these courts to servants and agents who are not parties to the contracts of carriage. The inference is especially strong when one realizes that the reasoning of these cases is the same as that used in *Hoffman* v. *British Overseas Airways Corp., supra*, 19 AVI (CCH) at 17,181, in rejecting the argument of the defendant, a corporate agent of the air carrier, about venue under Warsaw Convention:

> "[t]he forum in which plaintiff-passenger may institute an action against the airline company must be confined to the parties to the contract."

The attitude of French courts may be gleaned from the case of *Billet* (*Ministere Public c.*) (1964) 27 R.G.A.E. 257, note E. du Pontavice (Trib. corr, Versailles, 11 July 1964), rev'd (1965), cassation sub nom. Cie U.T.A., Lagarrigue, D.S. 1970 J. 81 note P. Chauveau (Cass. crim. 3 Dec. 1969). Plaintiffs had brought an *action civile* against the pilot of a plane. The carrier was joined on the grounds of vicarious liability. It was held that Article 24 of the Warsaw Convention ousted the court's jurisdiction with respect to the carrier, but nowhere was it argued that the convention might also oust jurisdiction with respect to the pilot. (An *action civile* is a procedure found

in civil law countries whereby a plaintiff seeks damages by joining the prosecution and participating in a criminal action.) The *Billet* case has thus drawn a distinction, based upon the Convention, between carriers and employees of carriers, allowing an *action civile* against the latter but not the former.

In light of the precedents in the United States and Canada and in light of what can be inferred to be the attitude of the courts of other countries, it is respectfully submitted that the Warsaw Convention's policy of uniformity and the goal of uniform interpretation would be advanced by this Court's affirmation of the decision below.

## POINT II

### The language and history of the Convention requires the conclusion of unlimited liability of employees of an international air carrier.

Construction of a treaty must begin with the text. As was stated in *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2nd Cir. 1975):

> It seems elementary to us that the language employed . . . must be the logical starting point.

While nowhere in the Convention is the term "carrier" defined explicitly (Appellants' brief, page 11), there are strong textual indications that the word "carrier" was used throughout the Convention in such a way as to exclude from its meaning "agents". Parenthetically, as explained above in Point I, the word "agents" in the American translation of the Convention should be read as referring to both agents and employees.

The language of Articles 16, 20(1), 20(2) and 25(2) clearly show that in the minds of the drafters the word "carrier" certainly did not automatically include "agents". "Carrier" is used in contrast to, and as distinct from, "agents". It is used in this exclusive sense in three different contexts. Article 16 deals with the carrier's right to recover. (Article 16: "The consignor shall be liable to the carrier . . . unless the damage is due to the fault of the carrier or his agents.") Articles 20(1) and (2) exempt the carrier from liability in some situations. (Article 20(1): "The carrier shall not be liable if he proves that he and his agents . . ."; Article 20(2): ". . . the carrier shall not be liable if he proves . . . he and his agents . . ."). Finally, Article 25 imposes liability by removing the Convention's protection under certain circumstances. (Article 25: "The carrier shall not be entitled to avail himself . . . if the damage is caused under the same circumstances by any agent of the carrier . . .").

Thus, where the drafters intended to refer to both a "carrier" and its agent/employees, they felt a need to do so explicitly.

Counsel for Appellants make little effort, if any at all, to explain this contrasting use of "carrier" and "agents". (Appellants' brief, page 11). Also, counsel ignored the fact that the words are used in this contrasting manner in three different contexts, yet suggest that "carrier" should be construed as implicitly including agent/employees in a fourth context, that of Article 22(1) which provides for a limitation on the amount of recoverable damages. Counsel nowhere attempt to explain why the drafters would shift their use of "carrier" as the context shifts.

Other textual evidence that the drafters conceived of a "carrier" as separate and distinct from its agent/employees is found in Article 25, which makes a carrier liable for wilful misconduct. Articles 25(1) and 25(2) are

parallel provisions each imposing liability on the carrier; for the wilful misconduct of the carrier in Article 25(1) and for the wilful misconduct of the carrier's agent/employees in Article 25(2). If, as Appellants' contend, "carrier" includes "agents", what was the need for Article 25(2) at all? Article 25(1) would have been entirely adequate by itself.

It might be suggested that Article 25(2) was necessary to emphasize the notion of "acting within the scope of his employment", which is found in Article 25(2). Such a suggested explanation is inadequate because it raises a further question: Why did not the drafters feel a similar need to emphasize that notion when writing Article 22, the specific article before this Court for construction? There is no satisfactory answer to this further question because when Article 22 was amended by Article 25A of the Hague Protocol (Appellants' brief, Add 20) to give agents and employees the benefit of the limitation on damages, the notion of acting "within the scope of his employment" was indeed included. Conversely, it follows that the absence of that notion in Article 22 of the Warsaw Convention indicates that the drafters simply did not intend Article 22 to cover agent/employees.

Yet another textual argument is derived from reading together Article 22(1), which provides for the limitations on damages, and Article 25, which removes the benefit of Article 22(1) in cases of wilful misconduct. If, as Appellants contend, "carrier" in Article 22(1) is to be understood as including "agents" and if, as is clear from a plain reading of Article 25, "carrier" in Article 25 is used exclusive of "agents", then there is a terrible gap in the Convention. Agents who are guilty of wilful misconduct would have the benefit of Article 22(1)'s limitation of damages but would *not* be deprived of that benefit by Article 25. Thus Appellants' position, which presumably is rooted in the belief that a carrier and its agent/em-

ployees should be treated equally (Appellants' brief, page 25), leads to the incongruity that the least deserving employee, the one guilty of wilful misconduct, is treated better than the carrier itself.

This gap, and perhaps other gaps and problems as yet undetected, derive from the basic contradiction which Appellants urge upon this Court: namely, that "carrier" is used *in*clusively in Article 22(1) although it is used *ex*clusively in Articles 16, 20(1), 20(2) and 25(2).

Finally, Article 20(2) by itself gives further textual grounds for concluding that the drafters of the Convention viewed the liability of a carrier and of its agent/employees as two separate, distinct issues. The article relieves the carrier of liability for damage to goods and baggage due to an error in piloting. See, for example, *American Smelting and Refining Co.* v. *Philippine Air Lines, Inc.*, 4 Avi (CCH) 17,413 (N.Y. Sup. 1954) aff'd 285 A.D. 119, 141 N.Y.S.2d 818, aff'd 1 N.Y.S.2d 866. But there is nowhere any suggestion that a employee-pilot also would be relieved of liability. The liability of each is viewed as separate.

Counsel for Appellants nowhere present any textual arguments at all countering the above lines of reasoning or favoring their position. They simply ignore the text.

As for the proceedings of the Convention, counsel for Appellants say they shed no light on the issue of whether agent/employees are included in "carrier" (brief, pages 11, 25), claiming that the attempt by the Brazilian delegation to include a definition of "carrier" is irrelevant. While the proposed definition may not have been specifically aimed at resolving the question, it does show that the thrust of the Convention's thinking is in the direction of the concept of a "carrier" as a directing, controlling entity, with power of decision, rather than as including employees who, by definition, are those directed and controlled:

> The carrier shall be considered the person who owns, charters or manages an aircraft, uses it individually or jointly in the transportation of persons and goods, within the meaning of this convention, and in conformity with national regulation.
>
> *Block* v. *Compagnie Nationale Air France, supra,* 386 F.2d at 340.

The proposed definition is consistent with the construction of "carrier" as excluding agent/employees and so is evidence corroborating that construction.

Also, the reason for the Brazilian delegation's advancing its definition was, in the words of counsel for Appellants, that "the laws of the different countries were not uniform on the subject" (brief, page 11). That reason undercuts Appellants' theory (brief, pages 19-20) that the dafters undoubtedly thought of carriers as corporations.

Counsel for Appellants rely for support mainly on the opinion of commentators, who they admit differ greatly (Appellants' brief, pages 24-25). More important than the opinion of commentators and more illuminating than the bare fact that Article 22 of the Warsaw Convention was amended twenty-six years later by Article 25A of the Hague Protocol to resolve the question definitively in favor of giving "agents and employees" the benefit of the limitation on damages (by itself, the fact of the amendment argues both ways: as an addition to the original Convention or as a clarification of the original Convention), is the extent of the amendment. The amendment (Appellants' brief, Add 20) contains four separate ideas: agents and employees may (1) avail themselves of the limitation (2) provided they were acting within the scope of their employment (3) unless they acted recklessly; (4) the limitation applies to the total recovery and not severally to the recovery from each defendant. The more

extensive an amendment the less likely that it is simply a clarification of what was always tacitly understood and assumed, at least in the complete absence of any concrete evidence at all in the text or proceedings indicating such a tacit understanding.

All of the above must be judged in light of the standard laid down by the Supreme Court in *Herd & Co.* v. *Krawill Machinery Corp., supra,* 359 U.S. at 304:

> Any such rule of law [sheilding an agent from liability for his own negligence], being in derogation of the common law, must be strictly construed, for "[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making an innovation upon the common law which it does not fairly express." [citation omitted]

As was stated in *Husserl* v. *Swiss Air Transport Co., Ltd.,* 338 F. Supp. 1238, 1246 ((S.D.N.Y. 1975):

> [The drafters] must have been aware that to extinguish pre-existing rights their intent and expression must be clear; ambiguity or silence is rarely, if ever, sufficient. See Eck v. United Arab Airlines, Inc., 15 N.Y.2d 53, 225 N.Y.S.2d 249, 203 N.E.2d 640 (1964)

While it is appropriate liberally to construe a treaty so as to conform its language to its purpose, one must first discover that purpose. The purpose of limiting the liability of an employer does *not* necessarily imply a parallel purpose of limiting the liability of agent/employees. The decision in *Herd & Co.* v. *Krawill Machinery Corp., supra,* construing the Carriage of Goods by Sea Act and many state workmen's compensation laws which exempt employers but not co-employees, 2A Larson,

The Law of Workmen's Compensation §72.00, prove that there is no necessary implication. Appellants, having pointed to no language indicating this second purpose, having claimed that the minutes of the Convention are not informative (Appellants' brief, pages 11-12), and having admitted that the commentators are divided (Appellants' brief, pages 24-25), ultimately are resting their case on a repeated call for liberal construction. Even a liberal construction of a treaty cannot provide a purpose which is not to be found in its language or legislative history, or which does not necessarily flow from some other purpose of the treaty.

## CONCLUSION

**For all the above reasons, the order of the district court should be affirmed.**

Respectfully submitted,

SPEISER & KRAUSE, P. C.
*Attorneys for Amicus Sotorios Karras*

CHARLES F. KRAUSE
JOSEPH PIERINI
*of Counsel*

 The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

REED

VS

WISER

**AFFIDAVIT OF SERVICE**

STATE OF NEW YORK,
COUNTY OF NY , ss:

BERNARD S. GREENBERG being duly sworn,

deposes and says that he is over the age of 21 years and resides at 162 E. 7th St NY, NY

That on the 30th day of september, 1976 19 at

he served the annexed brief of Sotirios Karras, as Amicus Curiae upon

Bingham Engl[illegible], Jones , 99 John street, Kreindler & Kreindler, 99 park avenhe, NY, NY

in this action by delivering to and leaving with said attorneys two true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 30th day of september, 1976 19

Bernard S Greenberg

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977